In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

959.68 ACRES OF LAND IN MERCER COUNTY, PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1969 (App. 12). On October 24, 1969, Mr. Justice Brennan extended the time within which to file a petition for writ of certiorari to December 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States must pay as just compensation the value of land condemned as enhanced by the very project for which it was taken unless it can show that it was decided in the early stages of the project that the particular tract would be taken.

STATEMENT

The facts of this condemnation case relevant to the enhancement question were documentary and were not disputed below. They may be summarized as follows:

This dam and reservoir project was first authorized in 1938 (52 Stat. 1215) and the first funds were appropriated in 1959 (73 Stat. 491). At trial, the Government offered in evidence all of the Design Memoranda of the Corps of Engineers from the first General Design Memorandum of 1957 to and including Design Memoranda not yet finalized at and after the date of taking, to show that the project did not become fixed as to a specific area at any particular time, but remained flexible as the construction and acquisition of property progressed to completion (R. 127–137; Gov't Ex. 1–11).[1]

Specifically, these Design Memoranda showed that in 1957 the general plans for the project were approved by the Corps of Engineers for submission to Congress to obtain appropriations. The 1957 Design Memorandum included maps and aerial photographs of the area, and other information showing the dam

[1] References noted "R." are to the appendix in the court of appeals.

site and the pool level (920 feet), which encompassed part of the land here involved (R. 139; Gov't Ex. 1). It also contained plans, some of which were general and some of which were specific, for boat launching and access and recreation sites. (R. 127–128; Gov't Ex. 1). The memorandum noted that, since the pool level line would not correlate with property lines, "modification of the taking line in the establishment of real estate property taking is necessary to satisfy sound real estate practices and to include all lands required for project purposes. A gross appraisal covering areas, types and values of land to be acquired is contained * * *" (R. 132; Gov't Ex. 1).

Further and continuing feasibility studies were made up to and after 1959, when the first money became available for construction. These studies, after formal approval, became a part of the General Design Memorandum (R. 146–148; Gov't Ex. 2). They included plans for space for personnel (Gov't Ex. 1), relocation of roads (Gov't Ex. 6, 9, 10), railroads (Gov't Ex. 5, 9), public utilities (Gov't Ex. 6, 11), obtaining sources of aggregate for the construction (App. 153), and recreational facilities. (Gov't Ex. 6, 11). In 1963 it became certain that all of the tract here in question, including the part not inundated by the pool, would be taken.

At trial both parties' experts presented evidence of valuation, including and excluding the enhanced values resulting from the construction of the dam and reservoir. The court instructed the jury to value the property both ways and to return two verdicts. The jury returned a verdict of $121,200, taking into account

the enhancement due to the project, and $95,000 excluding the enhancement. Judgment was entered on the $121,200 verdict. The court of appeals affirmed on the basis of its opinion in *United States* v. *172.80 Acres of Land, etc.* (*Totten*), 350 F. 2d 957 (App. 10). The court held that the tract in question was not within "the scope of the project" under this Court's decision in *United States* v. *Miller*, 317 U.S. 369, because it was not sufficiently clear in the initial stages of the project that the specific tract in question would be taken.

REASONS FOR GRANTING THE WRIT

We believe that the interpretation of the scope-of-the-project rule announced by this Court in the *Miller* case is properly presented in *United States* v. *Reynolds*, October Term, 1969, No. 88, certiorari granted October 13, 1969, in which the government's brief on the merits was recently filed. The instant case, however, presents the issue of the substantive interpretation of the scope-of-the-project rule somewhat more directly than does *Reynolds*. If this Court should decide the substantive issue in *Reynolds*, the decision in that case should be applied here. However, if the Court declines to interpret the scope-of-the-project rule in *Reynolds*, we request that certiorari

be granted in this case for the reasons set forth in our petition for certiorari in *Reynolds*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
RICHARD B. STONE,
Assistant to the Solicitor General.
S. BILLINGSLEY HILL,
EDMUND B. CLARK,
Attorneys.

DECEMBER 1969.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 17504

UNITED STATES OF AMERICA, APPELLANT

v.

959.68 ACRES OF LAND, MORE OR LESS, SITUATE IN MERCER COUNTY, STATE OF PENNSYLVANIA, AND ARTHUR C. BURDETTE, ET AL.

Appeal from the United States District Court for the Western District of Pennsylvania

Argued April 21, 1969

Before HASTIE, *Chief Judge,* and FREEDMAN and STAHL, *Circuit Judges*

OPINION OF THE COURT

(Filed August 5, 1969)

HASTIE, *Chief Judge:* On this appeal the United States is challenging part of an award made to a landowner in a condemnation proceeding.

In 1965 the United States condemned a 237 acre tract owned by the Estate of Emma McKnight for use in the Shenango River Reservoir Project. In 1957 the Chief of Engineers had approved a General Design Memorandum outlining the overall plans for the project and disclosing that the government proposed to take land up to elevation 920. Such a taking would

have included 106 acres of the tract now in question, leaving the private owner with 131 acres enhanced in value by riparian status created by the project.[1] Later it was decided to expand the project beyond original contemplation by including areas, among them the remaining 131 acres of the tract, for public recreational development and use.

Thereafter, the United States condemned the entire 237 acre tract in a single taking. The award included the value of the 106 acres determined without regard to any affect of the project itself on land value. However, the award for the 131 acres including a substantial item for enhancement of value which occurred between the 1957 disclosure of the original project design and the enlargement of the project in 1963, because it then appeared that this acreage would become lake shore property available for private development. The sole question on this appeal is whether that enhancement of value may lawfully be part of the award.

In *United States* v. *172.80 Acres of Land, etc.*, 3d Cir. 1965, 350 F. 2d 957, we considered a similar award for project caused enhancement of the value of another tract taken for the same Shenango River Reservoir Project. We stated the controlling legal concepts and principles in the following language.

> Legal principles applicable to this case are stated in *Miller* v. *United States*, 1942, 317 U.S. 369, also a controversy in eminent domain over value enhancement resulting from the very project for which the property in suit was condemned. The Court ruled that where a public project was so planned and described by the

[1] The tract was upstream from a dam proposed as the key feature of the reservoir project. The consequent elevation of the water level would flood 106 acres and leave the remaining 131 fronting on the newly created lake.

government from the outset as to disclose a probability that a particular tract or area would be required for the project somewhat later, any enhancement of value between that disclosure of probable future need and subsequent condemnation of a particular tract should not be included in the condemnation award for that property. The Court reasoned that such "enhancement" reflected speculative judgment as to what the government would soon pay for the land rather than use value to a private purchaser. In a subsequent case, the Court described such an increase in value as "a hold-up value, not a fair market value". *United States* v. *Cors*, 1949, 337 U.S. 325, 334. See also *United States* v. *158.76 Acres of Land, etc.*, 2d Cir. 1962, 298 F. 2d 559, 560.

At the same time, the Miller case discussed those distinguishable situations in which land near a public project, but not indicated at the outset as probably to be included therein, is genuinely enhanced in market value by the neighboring public development. "Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor or proximity". 317 U.S. at 376.

The basic issue here is within which of the categories described in the Miller opinion the present situation belongs. In our judgment, the court below properly adopted the commissioner's conclusion that in 1959 there was not such probability of future inclusion of the Totten land in the then new public project as to require disallowance of enhanced value under the Miller doctrine. 350 F. 2d at 958–59.

The government now urges that we now reconsider the quoted reasoning and hold that no enhancement of value caused by the project for which land is taken can be recovered in condemnation. This contention

seems to proceed from the premise that it is always probable that public projects of this type will be enlarged beyond the original proposal before they are completed. However, we think our earlier decision stated the law correctly and we adhere to the position there announced.

On its facts the present case is not significantly different from its predecessor. In both cases the tracts in question were upstream from the projected dam with part of each tract below and part above the 920 level which bounded the area of taking as originally proposed. In both cases it appears that after publication of the original design representatives of the government had stated publicly and had represented to an owner of the tract in question that the 920 elevation would be the boundary of the project. In both records it appears that thereafter the incoming national administration of President Kennedy adopted a new policy of comprehensive development of recreational facilities in connection with water resources projects of the Shenango type which resulted in the theretofore unanticipated taking of the remainder of the tract in question. In both cases the trier of fact justifiably found that the project as originally conceived, designed, described and undertaken by the government was not attended by the probability that the parts of the tract in suit above the 920 level would be taken.

The earlier case differed from this one in that, after a government representative negotiating for the acquisition of the part of the tract below the 920 level assured the landowner that the rest of his land would not be needed, the landowner, relying upon that representation, sold the government his land below the 920 level for a price determined by the valuation of a government appraiser. Here, in contrast, the landowner

did not voluntarily sell his land below the 920 level. Rather, after the 1963 determination that his higher land also was needed by the government, the entire tract was condemned.

However, in both cases the critical issue was whether it seemed probable when the project was announced and undertaken that it might be so developed and enlarged as to include land above the 920 level. Both records justify the trier of fact's answer to that question. Supporting such findings were the assurances given to the landowners as to the limited extent of the project. Since the issue is not one of estoppel, it is not a decisive difference that in the earlier case the owner accepted the tendered price for the lower part of his tract in reliance upon governmental assurance that the upper part would not be taken.

Finally, the reasoning which justifies an allowance of enhanced valuation is not affected by the fact that here the entire tract was actually taken at one time after the unanticipated enlargement of the project while in the earlier case there were separate acquisitions, one before and the other after the unanticipated enlargement.

The judgment will be affirmed.

A True Copy:

Teste:

_____,

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX B

United States Court of Appeals

for the Third Circuit

No. 17,504

UNITED STATES OF AMERICA, APPELLANT

v.

959.68 ACRES OF LAND, MORE OR LESS, SITUATE IN MERCER COUNTY, STATE OF PENNSYLVANIA, AND ARTHUR C. BURDETTE, ET AL.

(D.C. Civil No. 65–679)

On appeal from the United States District Court for the Western District of Pennsylvania

Present: HASTIE, *Chief Judge* and FREEDMAN and STAHL, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 9, 1968 be, and the same is hereby affirmed.

Attest:

THOMAS F. QUINN,
Clerk.

AUGUST 5, 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 2 1970
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. 907
October Term, 1969

UNITED STATES OF AMERICA,
Petitioner

v.

959.68 ACRES OF LAND IN MERCER COUNTY, PENNSYLVANIA

BRIEF OF RESPONDENT OPPOSING PETITION FOR CERTIORARI

ROUTMAN, MOORE, GOLDSTONE & VALENTINO,
By BERNARD GOLDSTONE,
Attorneys for Respondent.
8 West State Street,
Sharon, Pennsylvania 16146.

Mercer Printing Company, Law Printers, 801-803 Lackawanna Street, Sharon, Pa.
Mrs. Winnifred Snowden, Mercer County Representative, Court House, Mercer, Pa.

INDEX TO BRIEF

	Page
Question Presented	1
Counter-Statement of the Case	2
Argument	5

TABLE OF CITATIONS

Cases:

United States v. 172.80 Acres in Mercer County, Pennsylvania, 350 2d 957 (3rd Cir. 1965) (Totten)	3, 4, 6, 7
United States v. Crance, 341 F. 2d 161, certiorari denied, 382 U.S. 815	6, 8
United States v. First Pyramid Life Ins. Co., 382 F. 2d 804	6, 7, 8
United States v. Miller, 317 U.S. 369	3, 4, 5, 6, 8, 9
United States v. Reynolds, Oct. T., 1969, No. 88	5, 6
Wardy v. United States, 402 F. 2d 762	5

Rule:

Supreme Court Rule 19 (1-b)	6

Question Presented

BRIEF OF RESPONDENT OPPOSING PETITION FOR CERTIORARI

QUESTION PRESENTED

"Where the original plans in connection with the Shenango River Project (approved in 1957 by the Army Engineers and authorized by Congress in 1938 with funds appropriated on September 10, 1959) provided for land acquisition below elevation 920 for reservoir purposes, which included 106 acres of a 237 acre tract (and the owner was so advised by various government representatives), does the subsequent condemnation of the entire 237 acre tract by the government in 1965, by virtue of a change in policy in 1961 to include the remaining portion with other additional areas for recreational purposes, which was not contemplated in the original plans, entitle the owner to the enhancement value of the 131 acres above elevation 920 from the date of the project to the date the additional 131 acres were added to the project?"

COUNTER-STATEMENT OF THE CASE

In 1938, Congress authorized the Shenango River Reservoir Project in Western Pennsylvania; 52 Stat. 1215. On June 25, 1957, the Chief of Engineers gave final approval to a General Design Memorandum containing overall plans and cost estimates for the project (A. 63).

On June 25, 1965, the government condemned 237 acres of respondent's land, being Tract 333, in connection with the project. The land in question consisted of 106 acres below, and 131 acres above elevation 920.

The original plans comprehended the acquisition in fee or easement of all lands in reservoir basin below elevation 920 (A. 59) and included a number of public facilities as shown on Plate 10 of General Design Memorandum (A. 60). The public facilities, including specific recreational facilities, were clearly delineated on the plan, none of which were located on the 131 acres of respondent's land above elevation 920.

On September 10, 1959, the government became committed to the project by virtue of an act of Congress, 73 Stat. 491 appropriating funds pursuant to the plans.

When land acquisition was instituted, the owners of Tract 333 were advised by various government representatives that none of the land above elevation 920 would be taken and that the owners could continue to utilize the same for any purpose they saw fit (A. 97, 104, 110, 113-116).

In 1961, the government changed its policy and decided to add additional land to the project (A. 85), which consisted of two new public use sites, neither of which included respondent's land. (See Design Memorandum No. 5, Preliminary Master Plan, approved April 24, 1961, Gov. Ex. No. 2, A. 83, 84).

The enhancement question of one of the sites was involved in *United States v. 172.80 Acres in Mercer County, Pennsylvania,* 350 2d 957 (3rd Cir. 1965), which ruled in favor of the owner, Totten, relying on the rules laid down in *United States v. Miller,* 317 U.S. 369.

On May 14, 1963, the government again changed its plans by adding three new public use sites which included the respondent's 131 acres above elevation 920 (A. 68-72, 98, 99).

The additional five sites were defined in Design Memorandum No. 3, Part III, Real Estate approved October 20, 1961 (A. 72); Supplement No. 1 of Design Memorandum dated April 30, 1962 (A. 73) and corrected Design Memorandum No. 3, Part III, Real Estate (Gov. Ex. No. 5) approved July 3, 1963, the latter of which included the respondent's 237 acres above and below elevation 920 (A. 73, 74).

The trial before a jury to ascertain just compensation took place April 29, through May 2, 1968. By agreement of the parties and upon instruction by the District Court, the jury returned two verdicts, one for $121,200.00, which took into account the enhancement of the 131 acres above elevation 920, and one for $95,000.00, which excluded any enhancement.

The District Court held that the documentary and uncontradicted oral evidence disclosed that the original

project, which did not include the 131 acres in question, became finalized when the government became committed to the project on September 10, 1959, and therefore, the acreage above elevation 920 was not within the probable scope of the project. Accordingly it held that the owners were entitled to damages for the enhancement value by virtue of the change in plans in July, 1963, and entered judgment in the full amount of the verdict of $121,200.00.

The Third Circuit Court of Appeals held that the instant case did not significantly differ from the *Totten* case and that in both cases it appeared that the incoming national administration of President Kennedy adopted a new policy of comprehensive development of recreational facilities in connection with the project which resulted in the unanticipated taking of the remainder of the tract in question. It further held that in both cases the trier of fact justifiably found that the project originally conceived, designed, described and undertaken by the government was not attended by the probability that parts of the tracts above 920 would be taken. The judgment of the District Court was affirmed on the basis of the *Miller* case (supra). The Petition for Certiorari should be dismissed for the reasons hereinafter set forth.

ARGUMENT

The reasons set forth by Petitioner in its Petition for Writ of Certiorari are without merit for the following reasons:

First: The scope of the project rule announced by this Court in the *Miller* case is not properly presented in *United States v. Reynolds,* October Term, 1969, No. 88 as alleged by Petitioner.

The primary question, if not the sole one, as it pertains to the instant matter presented in the *Reynolds* case was whether or not the jury should decide whether the land in question was within the scope of the project. The Sixth Circuit Court of Appeals stated (p. 306):

> "The (District) Court specifically wanted the jury to decide whether or not a recreational area was within the scope of the project prior to dealing with the monetary aspects. . . . Since the jury decided that the 78 acre tract was within the scope of the project from the beginning, it did not include in its award any value due to enhancement. Unless there is other error present, this Court will not overturn the verdict of the jury based on substantial evidence. . . ."

This ruling is in conflict with *Wardy v. United States,* 402 F. 2d 762, wherein it was held that the Court and not the jury was to determine the question.

Since the *Reynolds* case was reversed on other grounds and must be retried, the government is now seeking to

have this Court rule that on retrial the District Court and not the jury shall decide whether the land in issue was within the probable scope of the project.

The incidental question attempted to be raised in the *Reynolds* petition is not properly before this Court. The Petitioner in that case requests this Court to reinterpret the scope of the project test as it has evolved from the *Miller* case. The substantive issue of the scope of the project was not squarely decided by the Court of Appeals in *Reynolds* and thus is not a matter properly to be considered by this Court.

The Petition for Certiorari in *Reynolds* in this latter respect does not comply with the provisions of Supreme Court Rule 19(1-b).

The *Reynolds* case is not analogous for the reason that counsel for both sides in the instant case agreed that the question relating to the scope of the project was under the law and evidence a matter for the Court to determine.

Second: The cases cited in the *Reynolds* petition, *United States v. First Pyramid Life Ins. Co.*, 382 F. 2d 804, and *United States v. Crance*, 341 F. 2d 161, certiorari denied, 382 U.S. 815, are not in conflict with the instant case and *United States v. 172.80 acres of land, etc. (Totten)*, 350 F. 2d 957.

The *Miller* rule does not require reinterpretation.

Crance, unlike *Totten* and the instant case, was within the probable scope of the project when the master plan for recreational purposes was finalized. Originally the *Crance* 35 acres were included in the first design memorandum for reservoir purposes. In October, 1953, the gov-

ernment established a new land acquisition policy revising downward the amount of land to be taken from the *Crance* property. From its inception the project contemplated recreational facilities as an integral part thereof. The first design memorandum in 1953 included the *Crance* property. Maps were prepared by the district and area engineers which approved eight sites excluding the *Crance* property for recreational purposes. Public hearings were then held and thereafter it was included. With reference to the approved eight sites the Court said (p. 164):

> "First, this was not a final plan. It was not until later in 1957 that an engineer was selected to prepare a master plan for recreational purposes. . . . To hold, in effect, on a project of this kind that simply because this particular tract was not delineated on the map at the time of appropriation of funds for the project by Congress, it had been excluded, would be giving undue weight to the proposed diagram of the reservoir plan. . . . Not until the reservoir lines are finalized, can there be a practical determination as to the number and location of the necessary recreational sites. . . . The property condemned (35 acres) was taken during construction from an area of probable acquisition for fulfillment of a recreational purpose which was within the scope of the project from its inception."

In *First Pyramid* it was held that since the original plan contemplated a relocation of the city water facilities the site of which was not specifically delineated, the land condemned being contiguous to the facilities and the only logical area for relocation, was within the probable scope of the project.

Argument

The present case can be differentiated for the reasons that the final plan was approved by the Chief of Engineers on June 25, 1957, and specific recreational sites clearly delineated. The final plan not only did not include land above elevation 920 but the record discloses that the government publicly stated and represented to the owners that the 920 elevation was the boundary line of the project.

Thus we have a complete project clearly finalized, designating the boundary of the project and the specific locations of the recreational areas which did not include the property in question. It was only after the incoming national administration of President Kennedy that a new policy of comprehensive development of recreational facilities was adopted which resulted in the unanticipated taking.

In view of the government's policy change the District Court and the Third Circuit correctly held that the land in question was not within the probable scope of the original project.

It is evident that in *Crance* and *First Pyramid* no policy changes were involved; that all the proceedings prior to acquisitions related to the preparations incident to the completion of the master plans; and which when finalized included the properties in question. Unlike the instant case those cases held, under the *Miller* rule, that the properties were properly within the probable scope of the project.

The Petitioner ostensibly desires this Court to change the long standing *Miller* rule. The decided cases disclose no valid reasons for this Court to do so. Just compensation envisages the requirement that owners be compensated for the fair market value for the taking of their

property and this includes enhancement damages to property not considered to be within the probable scope of the original project. In *Miller*, Your Honorable Court said (p. 377):

> "The question then is whether the respondent's lands were probably within the scope of the project from the time the government was committed to it. *If they were not, but merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement.*" (Italics supplied.)

CONCLUSION

The 131 acres above elevation 920 of the owner's 237 acres condemned by the government on June 25, 1965, were not within the probable scope of the project on September 10, 1959, when the project was finalized. Thus, under the *Miller* rule enunciated by this Court and applied in the District Court and the Court of Appeals the enhancement value was correctly included in the jury verdict and the judgment of $121,200.00 entered by the District Court.

Therefore for the reasons heretofore set forth the Petition for Certiorari should be dismissed.

Respectfully submitted,
ROUTMAN, MOORE, GOLDSTONE & VALENTINO,
By BERNARD GOLDSTONE,
Attorneys for Respondent.

8 West State Street,
Sharon, Pennsylvania 16146.